

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 23 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications)
Act of 1996)

CC Docket No. 96-98

Intercarrier Compensation)
for ISP-Bound Traffic)

CC Docket No. 99-68

To: The Commission

**RESPONSE OF FOCAL COMMUNICATIONS CORPORATION,
PAC-WEST TELECOMM, INC., AND US LEC CORP.
TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION**

On June 14, 2001, several parties filed Petitions for Reconsideration or Clarification of the Commission's *ISP Traffic Order*.¹ Focal Communications Corporation ("Focal"), Pac-West Telecomm, Inc. ("Pac-West"), and US LEC Corp. ("US LEC") (sometimes referred to collectively as "Joint Commenters"), by their undersigned attorneys, hereby file their response to those Petitions.

I. FOCAL, PAC-WEST, AND US LEC SUPPORT THE WIRELESS WORLD LLC REQUEST TO RECONSIDER AND MODIFY THE GROWTH CAP AND NEW MARKET BAR.

Wireless World LLC joins the long list of other carriers that take exception to the Commission's "growth cap" and "new market bar."² The growth cap places limits on the amount of intercarrier compensation for traffic delivered to an Internet service provider ("ISP")

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*ISP Traffic Order*" or the "*Order*").

that a terminating carrier may receive for years 2001, 2002, and 2003.³ The new market bar prohibits receipt of intercarrier compensation for ISP-bound traffic if a competitive local exchange carrier (“CLEC”) is not already serving a particular market.⁴ Core Communications, Inc. (“CoreTel”) has already sought a stay of these provisions because of the highly anti-competitive implications of these new rules.⁵ Focal, Pac-West, and US LEC filed a response in support of the CoreTel Petition, and demonstrated through declarations from executives of all three companies how their future operations will be negatively affected by these restrictions on expansion of service.⁶ Wireless World reiterates the substance of those claims, and highlights aspects of the *ISP Traffic Order* that should be revised on reconsideration.

A. While the Joint Commenters Agree that the New Market Restrictions Must be Postponed or Substantially Revised, a Bright-Line Test Would be Inadequate to Define New Market Entry.

As Wireless World, Focal, Pac-West, and US LEC have shown, there are numerous events that must take place after a CLEC has decided to enter a new market, but before a CLEC begins to exchange traffic with the ILEC in that market.⁷ Each step the CLEC takes – from certification to contract negotiation to collocation cage preparation to ordering equipment – involves a commitment of capital and management time. Focal, Pac-West, and US LEC believe, however, that a CLEC commitment to a new market cannot be evidenced by any particular arbitrary point among these developmental stages. Wireless World proposes that the

² Wireless World LLC Petition for Reconsideration and Clarification at 2.

³ *ISP Traffic Order* at ¶ 78.

⁴ *Id.* at ¶ 81.

⁵ See Request of Core Communications, Inc. for Stay Pending Judicial Review (filed June 1, 2001).

⁶ Response in Support of Petition of Core Communications, Inc. for Stay Pending Judicial Review (filed June 6, 2001) (“Joint Commenters Response”).

⁷ Joint Commenters Response at 4-5, Declaration of Wally Griffin (CEO, Pac-West Telecomm, Inc.) at ¶ 7; Declaration of John Barnicle (COO, Focal Communications Corporation) at ¶ 6; Declaration of Aaron D. Cowell, Jr. (President, US LEC Corp.) at ¶ 7.

test for whether a carrier is already “entering” a market should be whether it had requested an interconnection agreement with the incumbent local exchange carrier (“ILEC”) prior to the effective date of the *Order*.⁸ Similarly, the Florida Public Service Commission asks whether state certification, or approval of an interconnection agreement, constitute new market entry by a CLEC so as to avoid the bar on compensation for termination of ISP-bound traffic.⁹

Focal, Pac-West, and US LEC certainly see the basis for Wireless World’s proposal, and understand the difficulty the Florida PSC envisions in enforcing the new market restriction. However, the Joint Commenters assert that bright line rules do not necessarily reflect a CLEC’s substantial and largely irreversible commitment to a new market that should be reflected in the application of any FCC decision on new markets. If the Commission does not eliminate the new market restriction, or postpone it for one year, the Commission must rule that a carrier has entered a new market when it has made an appreciable irretrievable investment to provide service in that market. That point will likely have to be decided on a fairly flexible basis, because it is extremely difficult to establish a bright line rule on new market entry. Therefore, the Joint Commenters propose the following: for LECs exchanging traffic for the first time in a market after June 14, 2001, the Commission should presume that the LEC had made an appreciable irretrievable investment to serve that market prior to June 14, 2001, the effective date of the *Order*. At the request of the LEC that must pay intercarrier compensation to the LEC terminating ISP-bound traffic,¹⁰ the terminating LEC would be required to demonstrate to the applicable state commission that it had made its appreciable irretrievable investment prior to June 14, 2001. Types of investments that could be considered appreciable and irretrievable for a

⁸ Wireless World Petition at 4-5.

⁹ Florida Public Service Commission Petition for Clarification at 2-3.

¹⁰ Note that, as discussed below, if the ILEC does not adopt the federal intercarrier compensation regime for the state in question, the new market restriction is not triggered. In that case, the CLEC entering the new market would

particular market would include establishing real-estate contracts, establishing construction or build-out contracts, entering into customer-service agreements, or entering into vendor contracts for facilities to be used in that market. This list is not exhaustive, obviously, but it provides an indication of the types of expenses that CLECs incur long before they commence service in a particular market.¹¹

While the Commission attempted to set a bright line to determine new market entry – whether a CLEC is already exchanging traffic with an ILEC – the Commission must recognize that the predicate facts for this restriction are simply wrong. The statement in the order that “carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans”¹² has no basis in fact. Focal, Pac-West, and US LEC have relied upon the established law that has required the payment of terminating compensation, even at minimal levels such as those under the new federal regime, for the transport and termination of ISP-bound traffic. If the Commission retains the provisions of the *Order* that bar all terminating compensation for ISP-bound traffic in markets a CLEC has not served already, the Commission will have substantially altered the established law to the detriment of CLECs such as Focal, Pac-West, and US LEC. As a result of that detrimental impact, CLECs will most certainly have to

be compensated for ISP-bound traffic at the contract rate or state-based rate for reciprocal compensation for section 251(b)(5) traffic.

¹¹ This proposal must be considered in connection with the growth cap imposed by the *Order* as well. If the new market restriction is modified but the growth ceiling is not, carriers that have not exchanged traffic in the first quarter of 2001 in a particular market would calculate growth using a baseline of zero. That has the same effect as a bar on intercarrier compensation for ISP-bound traffic in a new market. As proposed in the Joint Commenters Response to the Core-Tel Petition for Stay Pending Judicial Review, the Commission should delay implementation of the growth ceiling so that the base period will be the first quarter of 2002, rather than the first quarter of 2001. Joint Commenters Response at 7. If that proposal is not adopted, the Joint Commenters propose the baseline for calculating the growth ceiling should be the national average minutes of use per switch recorded by *all* CLECs (that have exchanged traffic for at least six months prior to 2001) during the first quarter of 2001. *Id.* The proposal described above is consistent with the Joint Commenters’ earlier proposal that a “new” switch subject to the rule would be any switch deployed within one year prior to and one year after the effective date of the *Order*. *Id.*

¹² *ISP Traffic Order* at ¶ 81.

make adjustments to their prior business plans if the new market restriction is not revised. Such reliance was not unreasonable, either. A year ago, the Commission's *Declaratory Ruling* was vacated for the simple reason, among others, that the Commission failed to recognize that a locally-dialed call delivered to a called party's premises qualified for reciprocal compensation.¹³ It would have been unreasonable for CLECs to assume that the Commission would repeat the same mistakes a second time. Instead, CLECs assumed that the Commission would follow the roadmap provided by the Court and rule that ISP-bound traffic is subject to section 251(b)(5) of the Telecom Act.

Further, Focal, Pac-West, and US LEC reasonably relied upon the conclusions reached by more than 30 state commissions, as affirmed by every court that has reviewed the merits of those decisions on appeal, that reciprocal compensation is owed for ISP-bound traffic. It would have been unreasonable for Focal, Pac-West, and US LEC to second-guess state commissions, as well as state and federal courts, especially when Focal, Pac-West, and US LEC argued for the required payment of reciprocal compensation for ISP-bound traffic and had won, time and again. Admittedly, one must consider litigation risks when establishing business plans, but given the long time frames involved in planning for new market entry, and the overwhelming precedent that had been established that reciprocal compensation was owed for ISP-bound traffic, it is folly to suggest that Focal, Pac-West, and US LEC were unreasonable in including in their business plans any reciprocal compensation revenues in any amount greater than zero as required by the *Order*.

B. If Retained, the New Market Restrictions Apply Only if the ILEC has Adopted the Federal Regime.

¹³ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), *vacating and remanding* Declaratory Ruling, *Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999).

Wireless World also proposes that the new market restriction should apply only if an ILEC adopts the federal regime for intercarrier compensation for ISP-bound traffic.¹⁴ Focal, Pac-West, and US LEC agree with Wireless World that the new market restriction is inextricably related to the other aspects of the federal regime. In fact, it is clear that the bar on payment of intercarrier compensation for ISP-bound traffic to carriers entering a new market already takes effect only after the ILEC has adopted the federal regime. As the Commission stated, “Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to ‘pick and choose’ intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier.”¹⁵ Further, “We. . . are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic.”¹⁶ It is clear from the *Order* that the elements of the federal regime are not severable. Just as there is no growth ceiling if the ILEC does not adopt the federal regime, there is no bar on compensation for ISP traffic in new markets unless the ILEC adopts the federal rates, terms, and conditions for local voice and ISP-bound traffic.

SBC apparently agrees with this principle. SBC recently posted on its website the “Reciprocal Compensation Appendix” to its generic interconnection agreement.¹⁷ SBC has decided *not* to adopt the federal plan at this time in all 13 states in its service territory, but instead has offered to pay new bifurcated reciprocal compensation rates for all section 251(b)(5) traffic and all ISP-bound traffic (rather than the existing state rates as required by the *Order*). The “growth ceiling” and the “new market restriction” are not addressed in the Appendix. As SBC

¹⁴ Wireless World Petition at 5-6.

¹⁵ *ISP Traffic Order* at ¶ 89.

¹⁶ *Id.* at ¶ 90.

¹⁷ The Reciprocal Compensation Appendix is available at <https://clec.sbc.com/unrestr/interconnect/multi/index.cfm>.

already recognizes, the growth ceiling and the new market restriction are elements of the federal regime that apply only when an ILEC adopts the compensation elements of the regime.

II. FOCAL PAC-WEST, AND US LEC OPPOSE THE PROPOSAL TO ELIMINATE THE “MIRRORING RULE” IN THE PETITIONS FOR RECONSIDERATION OF THE THREE COALITIONS/ASSOCIATIONS OF RURAL TELEPHONE COMPANIES.

Separate petitions have been filed by three coalitions or associations of rural telephone companies.¹⁸ These coalitions want the FCC to eliminate the “mirroring” rule that requires ILECs to offer to terminate all 251(b)(5) traffic at the federal rates for ISP-bound traffic if they want to take advantage of the regime for ISP-bound traffic.¹⁹ Focal, Pac-West, and US LEC assert that the ILECs cannot have it both ways, and if the ISP-traffic compensation restrictions are retained, the mirroring rule must also be retained.

None of the rural ILEC coalitions addresses the policy issues underlying the mirroring rule. The FCC correctly concluded that, as a policy matter, it would be unwise and unfair to allow ILECs to benefit from reduced compensation requirements for ISP-bound traffic while allowing them to continue to receive reciprocal compensation payments when they are net recipients of inbound traffic.²⁰ The rural ILEC coalitions do not dispute the Commission’s conclusion that there are no “inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP.”²¹ They simply want the rules not to apply to them.

¹⁸ Petition for Reconsideration (Choctaw Telephone Company, et al.) (“Choctaw Petition”); Petition for Reconsideration and/or Clarification of the Independent Alliance on Inter-Carrier Compensation (“Independent Alliance Petition”); The National Telephone Cooperative Association’s Petition for Reconsideration (“NTCA Petition”).

¹⁹ Choctaw Petition at 2; Independent Alliance Petition at 5-6; NTCA Petition at 2-3.

²⁰ *ISP Traffic Order* at ¶ 89.

²¹ *Id.* at ¶ 91.

Focal, Pac-West, and US LEC also submit that the arguments of the Independent Alliance and NCTA are predicated on an inaccurate reading of the *Order*. Both associations assert that the *Order* requires the rural telephone companies to terminate Section 251(b)(5) traffic at the federal rates for ISP-bound traffic. This is not so. The *Order* gives the rural telephone companies the option to continue to terminate section 251(b)(5) traffic at the state-approved rate, but if the rural ILEC takes this option, it must also pay carriers the same rate to terminate ISP-bound traffic. These rural telephone companies want to have the best of both worlds, and that position has already been rejected by the Commission. The third coalition, Choctaw Telephone et al., understands that ILECs may opt out of the federal regime, but disparages the option as equivalent to a store clerk refusing to open a cash register when armed robbers point guns at them.²² If this analogy had a shred of credibility, every ILEC in the country would have already notified interconnecting carriers of their decision to follow the new federal compensation scheme. In fact, that is not the case. As discussed above, SBC has indicated on its website that it has decided not to follow the federal capped-rate alternative in its 13 states. CLECs interconnected with SWBT, Ameritech, SNET, Pacific Bell, and Nevada Bell, including CLECs that have not yet entered markets served by those carriers, will be able to receive section 251(b)(5) reciprocal compensation for all traffic terminated to ISP customers. If the largest BOC in the country has opted out of the federal regime, obviously there is more to the election than Choctaw et al. believe there is.²³ In short, the arguments asserted by the rural ILECs that the Commission has somehow compelled them to terminate section 251(b)(5) traffic (primarily “local” traffic) at the federal rates for ISP-bound traffic has no basis in fact.

²² Choctaw Petition at 5.

²³ It also demonstrates that reciprocal compensation for ISP-bound traffic is not the runaway train that will demolish the ILECs as they have been telling the Commission. SBC’s decision concedes the fact that state-based reciprocal compensation rates represent levels of compensation for ISP-bound traffic that are acceptable to the SBC ILECs.

Further, the Independent Alliance suggests that the *Order* somehow changes the interstate and intrastate access regimes and prevents rural ILECs from collecting the subsidies in access rates. That is not true. Although the Telecom Act actually imposes a requirement to eliminate subsidies from switched access rates,²⁴ the *Order* does not alter the access charge regime at all.²⁵ While it is true that the members of the Independent Alliance may no longer receive subsidies through access charges, the *Order* does not compel this result. These grounds for reconsideration of the *Order* are unsupportable.

III. THE FLORIDA PUBLIC SERVICE COMMISSION'S PETITION FOR CLARIFICATION ILLUSTRATES THE FLAWS IN THE *ORDER*.

As Focal, Pac-West, and US LEC have already argued, the *Order* is rife with flaws that will have anticompetitive implications for CLECs.²⁶ The Petition for Clarification filed by the Florida Public Service Commission points a bright spotlight at several of these flaws.

As discussed above, the Florida PSC seeks help in interpreting the Commission's flawed bright-line rule regarding new-market entry. Also as discussed above, Focal, Pac-West, and US LEC assert that it is extremely difficult to establish a bright-line rule because a CLEC's level of commitment to new-market entry can be assessed only by considering whether the CLEC has made an appreciable irretrievable investment to serve a particular market.

The Florida PSC also asks whether the provision of data services would be considered entry into a "new market" if a CLEC was already providing voice service.²⁷ Focal, Pac-West, and US LEC contend that there is no reason to distinguish voice services from data services in

²⁴ The United States Court of Appeals for the Fifth Circuit recently affirmed its view that "permitting the ILECs to recoup universal services costs through access charges is contrary to the plain language of § 254(e)." *Comsat Corp. v. FCC*, 250 F.3d 931 (5th Cir. 2001), 2001 WL 468422 at *7.

²⁵ *ISP Traffic Order* at n. 66.

²⁶ Joint Commenters Response to CoreTel Petition.

²⁷ Florida PSC Petition at 3.

calculating a compensation rate for transport and termination. The Commission has already acknowledged this view to be the correct one.²⁸ Therefore, the provision of data services in a state in which a CLEC is already providing voice services does not constitute entry to a new market.

IV. CONCLUSION

For all of these reasons, the Commission should reconsider and revise the *ISP Traffic Order* to modify the “growth ceiling” and “new market bar.” The Commission should revise the *ISP Traffic Order* as discussed herein and in the Focal, Pac-West, and US LEC Response to the Core Communications Petition for Stay.

Respectfully submitted,



Richard M. Rindler
Michael W. Fleming
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Dated: July 23, 2001

Counsel for Focal Communications Corporation,
Pac-West Telecomm, Inc., and US LEC Corp.

²⁸ See *ISP Traffic Order* at ¶ 90.

Certificate of Service

I, Carolyn W. Shaw, hereby certify that on this 23rd day of July, 2001, the foregoing document was served by first class mail to the following **(except as indicated)**:

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By Courier)

Bryan Tramont
Senior Legal Advisor
Office of Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon
Legal Advisor
Office of Chairman Michael K. Power
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Paul Gallant
Senior Legal Advisor
Office of Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Senior Legal Advisor
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dorothy Attwood
Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeffrey J. Carlisle
Senior Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Glen Reynolds
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Tamara Preiss
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey
Chief Policy and Program Planning
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Julie Veach
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeremy Miller
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel R. Shiman
Industry Economist
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jonathan Reel
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Legal Advisor
Office of Commissioner Keven J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jodie Donovan-May
Legal Advisor
Common Carrier Bureau
Policy Division
Federal Communication Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

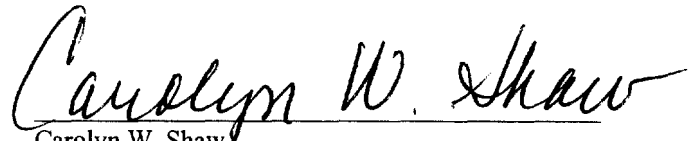
Cynthia B. Miller, Esq.
Harold McLean, Esq.
Bureau of Intergovernmental Liaison
Florida Public Service Commission
Capital Circle Office Center
2540 Shuman Oak Boulevard
Tallahassee, FL 32399-0850

L. Marie Guillory, Esq.
Daniel Mitchell, Esq.
National Telephone Cooperative Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Steven E. Watkins, Esq.
Stephen G. Kraskin, Esq.
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Benjamin H. Dickens, Jr., Esq.
Gerald J. Duffy, Esq.
Mary J. Sisak, Esq.
Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

Lewis Stern
Vice President and Chief Financial Office
Wireless World LLC
19 Estate Thomas
St. Thomas, U.S.V.I. 00802



Carolyn W. Shaw

382272.1